IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-1129

H.S.H., Ltd., *Petitioner*,

vs.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
*Respondent*,

and

THE CITY OF CERRITOS, et al.,
*Real Parties in Interest*.

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VON'S GROCERY COMPANY, *Petitioner*,

vs.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
*Respondent*,

and

THE CITY OF CERRITOS, et al.,
*Real Parties in Interest*.

On Petition for Writ of Certiorari to the
Supreme Court of the State of California

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# BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONERS ON BEHALF OF PACIFIC LEGAL FOUNDATION

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## OPINION BELOW

The Supreme Court of the State of California, in an opinion reported at 15 Cal. 3d 508 (1975), reversed the decision of the Court of Appeal of the State of California, Second Appellate District, Division Two, and held, *inter alia,* that inverse condemnation does not lie in zoning actions where the damage alleged can be deemed a reduction in market value of real property, even though the reduction in value could be severe. A demurrer to the count of the complaint sounding in inverse condemnation was thus sustained without leave to amend.

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## INTEREST OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION

Pursuant to Rule 42, Rules of the Supreme Court of the United States, this brief is filed with the written consent of both the attorneys for the petitioners and the attorneys for the respondents. Letters indicating such consent have been filed with the Clerk of the Court.

The Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the public interest. Policy for the Foundation is set by a seventeen-member Board of Trustees composed of concerned citizens. Ten of the seventeen-member Board are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only

where the Foundation's position has broad support within the general community.

Among those legal questions with which the Foundation has been concerned since its inception is the proper application of the law in controlling the use of privately owned land. The Foundation is particularly concerned that there be legal remedies available to effect a fair and just result when, through the attempted exercise of the police power, there is a substantial impairment in the use of land. Such concern prompted the Pacific Legal Foundation to participate as *amicus curiae* in the proceedings below.

The opinion of the California Supreme Court in this case gives the Foundation cause for concern for several reasons. The court held, in sum, that a cause of action in inverse condemnation does not lie for zoning actions in which the complaint alleges "mere" reduction in market value. In reaching its holding, the California court misconstrues this Court's opinion in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), and ignores the controlling precedent established by this Court in the landmark decision of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). The omission and misplaced reliance are disturbing in that the court was evaluating the case in terms of the state *and* federal constitutional provisions.[1]

More disturbing than the aforementioned deficiencies is the substantial void in the equity of California law that the state court decision creates. The

[1] *HFH, Ltd. v. Superior Court*, 15 Cal. 3d 508, 511 (1975).

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property owner is left without an effective remedy when, through a regulatory act, he has been forced to contribute more than his proper share to an undertaking that is presumably for the benefit of the public. Such a situation is patently unfair.

It is the extreme hardships that can result from the state court's decision which lead the Pacific Legal Foundation to present the following arguments in support of the Petition for Writ of Certiorari in this matter.

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## INTRODUCTION

In order to place the argument of *amicus* in its proper perspective, a brief description of the facts of the case, taken from the California court's opinion, will follow.[2]

Petitioners entered into an agreement whereby the purchase of the property in question was made contingent upon rezoning to commercial use. Following submission of a parcel map to the respondent city in 1966, the property was parceled in such a manner that it could be used only as a part of an integrated shopping center development. The city rezoned the property for commercial use and approved the map. Paying $388,000, petitioners thus acquired property which was located in one of four quadrants at an intersection and which was zoned for commercial use for the specific purpose of erecting an integrated shopping center.

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[2] *HFH, Ltd. v. Superior Court, supra* n.1, at 511-512.

In 1971 the property was temporarily reclassified agricultural pursuant to a moratorium during which land use policies were to be restudied. Later that year, the city adopted a general plan indicating that some of the land in the area of petitioners' property was appropriate for commercial use, but did not alter the agricultural classification of petitioners' property. Thereafter, plaintiffs submitted to the city plans for the development of the property as previously contemplated, together with a request that the zoning be reinstated to commercial.

In 1972 the city rejected petitioners' shopping center development proposal and rezoned the property to low density, single family residential use. It should be noted that each of the other three quadrants of the intersection were either zoned for commercial use or were currently being used for commercial purposes.

The size, shape, location and other physical factors relating to the subject property, as well as the character of the surrounding uses, allegedly rendered petitioners' property useless for single family residential purposes. It was alleged that as the direct and proximate result of the respondent city's actions, petitioners' property, which was allegedly valued at $388,000 under commercial zoning, was reduced to a market value of $75,000 under residential zoning.[3]

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[3] *HFH, Ltd. v. Superior Court, supra* n.1, at 512.

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## ARGUMENT

### THE DECISION OF THE CALIFORNIA SUPREME COURT CONFLICTS WITH THE CONTROLLING PRECEDENT ESTABLISHED BY THIS COURT IN PENNSLYVANIA COAL CO. v. MAHON AND THIS COURT'S ANALYSIS IN NECTOW v. CAMBRIDGE

In essence, the message of the California Supreme Court to property owners is this: even if one alleges a denial of all practical use of property causing a severe diminution in value as a result of regulatory action, that demonstration alone is not enough to state a cause of action in inverse condemnation. In so-stating, the court radically departs from this Court's decision in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922).

If the property owner is the victim of a *physical* appropriation of property in the public interest, there is no difficulty in upholding a remedy in inverse condemnation under both the Federal and State Constitutions. If an owner is the victim of an arbitrary and capricious or discriminatory act which purports to be in the public interest, or one related to a legitimate end, again there is no problem in maintaining an action in mandamus. Where, however, he is the victim of a regulatory act which is arguably in the public interest, serves a legitimate purpose, is implemented by proper procedure, but which grievously damages him because the economic burden and denial of the use of his property generated by the regulatory act falls on him alone, he is, in light of the state court's decision, *without* an effective remedy.

In reaching this result, the California Supreme Court relies, *inter alia,* on this Court's decision in *Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926). The state supreme court states that *Euclid,* over fifty years ago, settled the issue of whether inverse condemnation will lie in zoning actions in which the complaint alleges "mere" reduction in value.[4] It must be kept in mind that the *Euclid* decision contains no language to suggest that just compensation was sought by appellees under a theory of inverse condemnation or taking. Neither the words "eminent domain" nor "just compensation" appear anywhere in the decision.[5]

The opinion of this Court in its entirety is a consideration of the right of the City of Euclid to enact a general comprehensive zoning ordinance under its police powers. It does not discuss the separate and distinct question as to how the burdens caused by such zoning are to be distributed. To the extent that the state supreme court relies on *Euclid* as controlling and an overwhelming precedent for denying the property owner a remedy where a severe diminution in property value is suffered as a result of valid regulatory activity, it is in error. The question posed to the California court was not one of the *power* to zone, as in *Euclid,* but whether an action exists in in-

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[4] *HFH, Ltd. v. Superior Court, supra* n.1, at 514-515.

[5] This fact was pointed out to the state supreme court by M. Reed Hunter for the firm of Goldstein, Barcelow and Goldstein, Pacht, Ross, Warne, Bernhard & Sears in a letter dated November 26, 1975 in support of the Petition for Rehearing. The Petition for Rehearing was subsequently denied.

verse condemnation when, through the exercise of the zoning authority to promote some public purpose, a severe economic burden is imposed on a single property owner.

It is curious that the court chose to refer to *Euclid* but ignored *Pennsylvania Coal Co. v. Mahon, supra,* in reaching its decision. In *Pennsylvania Coal Co. v. Mahon, supra,* this Court established the principle that government regulatory action can so diminish the value of property as to constitute a taking of that property and thus require the payment of just compensation. In *Pennsylvania Coal Co.,* the Court considered a statute that made it commercially impracticable to mine certain types of coal. This Court stated:

> "The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon, supra* at 415.

*Pennsylvania Coal Co.* sets forth the permanent diminution in value test in determining the validity of traditional Euclidean-type zoning. The decision stands for the proposition that where an ordinance seeks to permanently restrict the use of property so that it may not be used for any reasonable purpose, it must be recognized as effecting a taking for which compensation is required. *Pennsylvania Coal Co.* thus, unlike *Euclid v. Ambler Realty Co.,* does not focus on a consideration of whether a municipality may zone under its police powers, but the separate

and distinct question as to how the burdens caused by such zoning are to be distributed, which is the fundamental question in this matter.

The economic considerations pertinent to the *Pennsylvania Coal Co.* determination were also relevant to this Court's decision in *Nectow v. Cambridge,* 277 U.S. 183 (1928). In *Nectow,* the plaintiff's property had been zoned by the City of Cambridge for residential use. The property bordered the Ford Motor Company and a soap factory. In addition, railroad tracks of the Boston and Albany Railroad were nearby *(Nectow v. Cambridge, supra* at 185). Plaintiff filed a suit seeking a mandatory injunction requiring the city to consider his application for a building permit without regard to the provisions of the zoning ordinance. Plaintiff challenged the ordinance on the grounds that it deprived him of his property without due process of law in contravention of the Fourteenth Amendment *(Nectow v. Cambridge, supra* at 185). A master appointed in the case found that:

> "'[N]o practical use can be made of the land in question for residential purposes, *because among other reasons herein related, there would not be adequate return on the amount of any investment for the development of the property.'" Nectow v. Cambridge, supra* at 187 (emphasis added).

This Court then stated:

> "It is made pretty clear that because of the industrial and railroad purposes to which the immediately adjoining lands to the south and east have been devoted and for which they are

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> zoned, the locus is of comparatively little value for the limited uses permitted by the ordinance." *Nectow v. Cambridge, supra* at 187.

This Court weighed the argument of the municipality regarding the general welfare as against the "serious and highly injurious" invasion of plaintiff's property and concluded that "the action of the zoning authority comes within the ban of the Fourteenth Amendment and cannot be sustained." *Nectow v. Cambridge, supra* at 188-189.

*Nectow* is instructive in that it holds that the zoning power cannot be exercised so as to impose upon a piece of land a use limitation which renders the land *economically* unusable. Second, in confrontations between the police power and a private claim of taking *Nectow* requires a consideration of the reasonableness of the zoning scheme as balanced against the injury sustained. These determinations can only be made after a trial. In this case it is useful to keep in mind that the City of Cerritos downzoned plaintiff's five acre parcel to low density residential use. The parcel is located at a street intersection where three of the corners are already devoted to commercial uses. Plaintiffs have alleged that their property has suffered a severe reduction in value as a result of this rezoning. The facts pleaded alleged that petitioners were deprived of all reasonable economic use of their property consistent with the residential zoning.

In the situation outlined above, this Court, in *Pennsylvania Coal Co.,* has advocated a case-by-case

approach to determine whether compensation is required. This Court stated:

> "When it [the diminution in value] reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. *So the question depends upon the particular facts.* The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power." *Pennsylvania Coal Co. v. Mahon, supra* at 413 (emphasis added).

In light of these statements, there can be no doubt that this Court intended that the owner of property which suffers a severe diminution in value through regulatory governmental action be able to present to the trier of fact his proof that a taking has occurred. The California Supreme Court rejects this approach in the instant case and limits the petitioners to an action in mandate without any potential for an award of damages. In so ruling, the state court ignores the holding in *Pennsylvania Coal Co., supra.*

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## CONCLUSION

It is respectfully urged that a writ of certiorari be granted herein for the reason that the decision rendered by the Supreme Court of California leaves a substantial void in the equity of California law. In the instant case a severe diminution in value of that property has been brought about by the exercise of

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the zoning power. The state supreme court has denied petitioners here the opportunity for a trial and even the opportunity to amend their complaint to state the best cause of action possible. The state supreme court responds to the plight of the petitioners by saying that their remedy, if any, lies in mandamus. In so holding, the state court denies petitioners the opportunity for just compensation on the basis of the alleged nonphysical taking of their property. Moreover, the state court decision conflicts with this Court's controlling decisions in *Pennsylvania Coal Co. v. Mahon, supra,* and *Nectow v. Cambridge, supra.*

The state court decision, thus, is of great and far-reaching public consequence and deserving of this Court's attention.

Dated, February 6, 1976.

Respectfully submitted,

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